UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 11

ALTON H. PIESTER, LLC

and

Case no. 11-CA-21531

DARRELL CHAPMAN

MEMORANDUM IN SUPPORT OF EMPLOYER'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

INTRODUCTION AND SUMMARY

In the compliance phase of this matter, Judge Mary Cracraft (ALJ) ruled on December 30, 2010 that the employer was required to pay the full backpay award calculated by the General Counsel. The employer Alton Piester LLC (APL) had argued that the General Counsel's calculation method was incorrect and that Mr. Chapman's backpay should be terminated as of June 2007 when APL learned that its insurance carrier would not cover Mr. Chapman if he were returned to work. The ALJ ruled this despite agreeing that APL had a well-established policy of refusing to hire drivers if they driver would adversely impact APL's insurance coverage.

APL excepts to the ALJ's findings that:

- 1) Chapman's backpay was not terminated in June 2007.
- 2) Even if Chapman's backpay should be terminated in June 2007, he was eligible for reinstatement in November 2007.

APL no longer contests the method of calculating the backpay, i.e., the use of only certain drivers to compute average pay.

ALTON PIESTER LLC BACKGROUND

APL is a small agricultural trucking company located in Newberry, South Carolina. At the time Chapman was terminated, APL had twelve drivers, two office workers, and a mechanic. Mr. Piester (the President) worked primarily in his office. At the same time Chapman was terminated, APL was rocked by two events. APL was faced with dramatically higher fuel costs and the current economic recession was beginning. As a result, APL was hit with huge cost increases. At the same time, the trucking market became extremely competitive with trucking companies fighting intensely over shrinking business. APL has suffered a sharp decline in business since 2007. Mr. Piester is now the President, a driver, the dispatcher, and the office staff. APL no longer has an office staff and has reduced its drivers to four.

APL was never a sophisticated employer and does not have Human Resources expertise.

Mr. Piester had never even heard of the NLRA before this case arose. APL had no formal personnel policies, personnel records organization, or a disciplinary system.

CHAPMAN'S BACKPAY SHOULD BE TERMINATED AS OF JUNE 2007

It is uncontested that in June 2007 Mr. Piester decided to look into the possibility of reinstating Mr. Chapman in order to cut off the potential damages in this case. It is also uncontested that it was APL's well-established practice, without exception, to check with the insurance company before adding any driver. As Ms. Cindi Jackson (of the Tidwell Insurance Agency) testified, APL was, in fact, required to do this before adding a driver. Ms. Jackson informed APL, on June 18, 2007, that Mr. Chapman was not an acceptable driver, and if APL added him as a driver, coverage would either be denied or the carrier would increase premiums. (Exhibit 5). The reason the carrier would cancel coverage or increase premiums was that Mr. Chapman, at that time, had three driving violations on his driving record and two accidents. (Id.).

APL and Ms. Jackson testified, and presented documentary evidence, that APL refused to hire drivers who might adversely affect insurance and terminated existing drivers when their driving records might adversely affect insurance.

The following is a summary of evidence and testimony concerning three drivers who were terminated because their driving records became unacceptable to the insurance carrier.

- Ronald Hasty -- Mr. Hasty had four traffic violations, one at-fault accident, and one notat fault accident. (Exhibit 7). A note on the fax cover sheet to the Tidwell Agency states "driver is unacceptable." Mr. Hasty's employment was therefore terminated by APL.
- Emmauel Griffin -- Mr. Griffin was similarly unacceptable to the insurance carrier as reflected in Exhibit 9 and his employment was terminated when APL learned of this.
- James Seibert -- Mr. Seibert's employment was also terminated due to two at-fault accidents during his employment with APL.

APL also presented evidence of four applicants for driver positions whom APL did not hire because the insurance carrier reported to APL that the drivers would cause an adverse impact on insurance coverage or premiums.

- J.T. Mathis -- APL inquired about hiring Mr. Mathis in March 2010. At that time, he had not had his commercial driver's license (CDL) for two years and the insurance carrier informed APL he would therefore cause an increase in premiums. Therefore, APL did not hire Mathis at that time. APL waited until May 2010 at which time Mathis had two years experience on his CDL. (Exhibit 6).
- Jonathan Free -- APL inquired about hiring Mr. Free in August 2007. At that time,
 Free had violations on his driving record and the carrier advised that he would cause an increase in premiums. Therefore, APL did not hire him at that time. APL did hire

him a year later, in August 2008. By that time, two violations on Mr. Free three-year driving record had "fallen off" his record. Therefore, he was acceptable to the insurance carrier and was hired. (Exhibit 8).

- John Burton -- Mr. Burton was not hired after the insurance carrier informed APL
 that he was unacceptable because he had his CDL for less than two years. (Exhibit
 10).
- Joseph Suber -- Similar to other applicants, APL did not hire Mr. Suber after being
 informed by the insurance carrier that he was unacceptable due to an accident and a
 speeding violation. (Exhibit 11).

The only slight deviation from APL's uniform practice of following the insurance company's warnings concerns a Mr. Cagle. Mr. Cagle was a mechanic whom, according to Mr. Piester's testimony, would occasionally need to drive a truck. The insurance carrier informed APL that adding Mr. Cagle might cause an increase in premiums because he had his CDL for less than two years. APL, nevertheless, added Mr. Cagle. This was not the deviation from its standard practice for several reasons. First, Mr. Cagle was a mechanic. Mechanics are much more difficult than drivers to find and retain. Therefore, APL had to be more lenient if it wanted to hire Mr. Cagle. Also, as a mechanic, he drove far less often than did the drivers. Finally, Mr. Piester testified that his insurance premiums did not ultimately go up because he hired Mr. Cagle. Therefore, this one slight deviation from APL's uniform practice of following the insurance company warnings, was legitimate and explainable and, therefore, is not proof that APL does not follow its rule.

The General Counsel does not contest that backpay may be ended if the complainant is not eligible for rehiring under an employer's legitimate and non-discriminatory rules or

practices. APL does not contest that it has the burden of proving that it had a legitimate and nondiscriminatory practice of following the insurance company's warnings regarding drivers that might cause an adverse impact upon insurance coverage or premiums. There is ample NLRB precedent on both of these points and the rules are well-established.

if an employer establishes that an employee engaged in misconduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct.

First Transit Inc., 350 NLRB No. 68 (August 17, 2007) (emphasis added). In First Transit, the employer learned, during preparation for the unfair labor practice proceeding, that the employee had failed to disclose, on her employment application, that she had a criminal conviction.

Because the employer had a practice of terminating employees who failed to disclose such information on their applications, reinstatement was denied and backpay terminated as of the time the evidence was discovered. See, also, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (employer has a right to discharge employees despite prior illegal motivation in violation of the NLRA); John Cuneo, 298 NLRB 856 (1990) (reinstatement can be denied and backpay terminated as of the time an employee's terminable misconduct is discovered); NLRB v. Thayer Company, 213 F.2d 748 (1st Cir. 1954) (same).

The General Counsel will undoubtedly argue that APL's decision to hire Cagle disproves that it had a rule or practice of terminating, or not hiring, drivers whom the insurance company advised would cause an increase or loss of coverage. However, as explained above, the Cagle example is not a deviation from APL's practice. To the extent it could be considered a deviation; the deviation was entirely legitimate and understandable. The NLRB has recognized that explainable deviations from a work rule do not prohibit employer from raising the rule as a defense. For example, in *Saraha-Tahoe Corp.*, the Board held that the employer's occasional

exceptions to its non-solicitation rule did not preclude the employer from enforcing the rule against employees in other circumstances. 216 NLRB No. 184 (1975). In *Kelly Construction of Indiana*, the Board found that an employer's single deviation from a hiring policy was "isolated and marginal" and did not mean that the policy was not applied in a neutral manner. 333 NLRB 1272 (2001). Similarly, in *Synergy Gas Corp.*, the Board rejected an allegation of disparate treatment, finding that a single known deviation from a disciplinary policy "appears to be an anomalous occurrence." 290 NLRB 1098, 1103 (1988). In contrast, in *Avondale Industries*, the Board rejected the employer's argument that there was no disparate treatment because instances of its consistent application of the policy outnumbered its departures. 329 NLRB 1064, 1066 (1999). The Board stated that to rebut the General Counsel's case, instances of disparate treatment must be shown to "so few as to be an anomalous or insignificant departure from a general consistent past practice." *Id. Avondale* supports the conclusion that the Cagle situation does not disprove the rule because, unlike in *Avondale*, there was only one exception and it was for legitimate and understandable reasons.

The ALJ agreed that the one deviation from APL's policy is both understandable and an anomaly and does not disprove that APL applies the rule in a neutral manner. However, the ALJ went on to rule that because Piester knew about Chapman's accidents and driving record during his employment he would have found a way to keep him employed and the negative report from the insurance carrier did not prohibit Piester from re-hiring Chapman.

The ALJ has disregarded established NLRB precedent that an employer is entitled to enforce established work rules and practices and to use those to refuse to rehire an employee even if the employee were fired improperly. The fact that the insurance company could not prohibit APL from rehiring Chapman is beside the point. APL had a neutral rule of not hiring

employees who would adversely impact insurance. This neutral rule, as clearly demonstrated by the above caselaw, cuts off backpay.

The ALJ's reliance on the fact that Piester knew about the accidents and tickets during Chapman's employment is misplaced. The critical fact is that Tidwell did not know of them and would not have known of them until renewal of the insurance. The neutral rule is based on the insurance company notification of an adverse impact, which would obviously not occur during employment. While Mr. Piester did not initially report Chapman's accidents, he didn't fail to report them to protect Chapman—he did so to keep his insurance rates from going up. There is no evidence that Mr. Piester would have acted to shield Chapman. In fact, the above examples clearly demonstrate that APL would not hire drivers, even if it desperately needed them, if the insurance company gave a negative response.

Alternatively, the ALJ ruled that, because one traffic ticket would drop off in November 2007, Chapman was eligible for rehire then. This is incorrect. Chapman still would have had two accidents and two tickets on his three year record until April 2009 and two accidents until late 2010. (It is uncontested that Chapman refused an unconditional offer of reinstatement in June 2009). Based on the above described examples of other refused applicants, Chapman would not have been eligible for rehire before his refusal of the unconditional offer of reinstatement.

Conclusion

APL has a legitimate and non-discriminatory practice of excluding from employment any drivers who might cause an adverse effect upon insurance. Because, under this practice, Chapman was ineligible for rehire in June 2007, his backpay should be terminated as of that time.

For these reasons, Chapman's backpay award should be \$8,314.14.1

Respectfully submitted,

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Dated this 13th day of January 2011

¹ It is conceded that Chapman refused an appropriate offer of reinstatement in the 2nd quarter of 2010.